Supreme Court, U. S.
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In the Supreme Court
OF THE
United States

OCTOBER TERM, 1976

No. 76-1341

MICHAEL RAY RICHTER,
Petitioner,
VS.
STATE OF WASHINGTON,
Respondent.

PETITION FOR A WRIT OF CERTIORARI
to the Supreme Court
of the State of Washington

WINSTON, CASHATT,
REPSOLD, McNICHOLS,
CONNELLY & DRISCOLL
ROBERT H. WHALEY
PATRICK H. WINSTON
Fifth Floor
Spokane & Eastern Building
Spokane, Washington 99201
Counsel for Petitioner

Subject Index

	Page
Opinion Below	2
Jurisdiction	2
Questions Presented	2
Statutes Involved	3
Statement of the Case	3
Reasons for Granting the Writ	5
Conclusion	9

Table of Authorities Cited

Cases	Pages
Judd v. United States, 190 F.2d 649 (D.C. Cir. 1971)	7, 8
Schneckloth v. Bustamonte, 412 U.S. 218 (1973)	2, 6, 7, 9
State v. Mapp, 476 F.2d 67 (6th Cir. 1973)	7
United States v. Bolin, 514 F.2d 554 (7th Cir. 1975)	8
United States v. Heimforth, 493 F.2d 970 (9th Cir. 1974)	8
United States v. Rothman, 492 F.2d 1260 (9th Cir. 1973)	8

Constitutions	Pages
United States Constitution:	
Amendment IV	6, 7, 8
Amendment XIV, Section 1	6, 7

Statutes	Page
State Statutes:	
Revised Code of Washington 69.50.401(c)	3

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The Petitioner, Michael Ray Richter, respectfully prays that a Writ of Cetiorari be issued to review the judgment of the Supreme Court of the State of Washington, entered in the above-entitled case on February 7, 1977.

OPINION BELOW

The opinion of the Court of Appeals, Division III, State of Washington (Appendix A, pp. i-vi) is unreported. The order of the Supreme Court of the State of Washington (Appendix B, p. vii) denying review is reported, *State of Washington v. Richter,* 88 Wn2d 1004 (1977).

JURISDICTION

The judgment of the Court of Appeals, Division III, State of Washington, was entered on July 28, 1976 (Appendix A, pp. i-vi). A timely Petition for Rehearing in the Court of Appeals was heard and denied on September 23, 1976, *State of Washington v. Richter,* 15 Wn. App. 1038, (Appendix C, pp. viii-xi). The order of the Supreme Court of the State of Washington denying the Peitition for Review of the decision of the Court of Appeals was entered on February 7, 1977, *State of Washington v. Richter,* 88 Wn2d 1004 (1977), (Appendix B, p. vii). The jurisdiction of this Court is invoked under 28 U.S.C. §1257(3).

QUESTION PRESENTED

Whether a consent to search can be voluntarily given under the test of *Schneckloth v. Bustamonte,* 412 U.S. 218 (1973), where the party giving the consent:

(a) is a minor;

(b) is drug and alcohol intoxicated;

(c) is under arrest;

(d) is handcuffed;

(e) a the time of the consent has a firearm pointed at him by an undercover officer who has deliberately

appeared intoxicated;

(f) immediately before the consent had a firearm placed by the officer at his temple;

(g) was told he would be "blown away" if he ran;

(h) the officers conducting the search and obtaining the consent are attired in casual clothes appearing to be contemporaries of the defendant rather than police officers.

STATUTES INVOLVED

The Constitutional provisions and state statutes involved in this case are set forth in Appendix D, pp. xii-xiii.

STATEMENT OF THE CASE

The Petitioner, Michael Ray Richter, was arrested by two plainclothes detectives on the night of February 17, 1975 and charged with a violation of R.C.W. 69.50.401(c), possession of a controlled substance (Appendix D, p. xii). At that time, he was a 19 year old minor residing with several others in a home in Spokane, Washington. Throughout the day of February 17, 1975, the Petitioner had been smoking marijuana. On that date, Deputy Sheriff Danny O'Dell and Detective Michael Massong, were acting as undercover agents with the Spokane County Drug Abuse Unit. Earlier in the evening, they had received an anonymous tip that there would be a large quantity of marijuana in the house where the Petitioner resided. After meeting with the informant, the officers determined that it would be impossible to obtain a search

warrant based on the informant's information. Therefore, it was decided they would approach the residence with the informant to determine if they could gain entry without a warrant.

Prior to arriving at the residence, the officers and informant stopped at a grocery store to buy two six-packs of beer and a bottle of wine. When they arrived at the residence, one officer was holding an open beer and all appeared to act as if they had been partying. The Petitioner invited the police officers and the informant into the residence and immediately began rolling two marijuana cigarettes which were passed around the room. The officers placed the beer and wine on a table and offered it to all who were present. The two officers accepted the marijuana cigarettes that were passed around the room and simulated smoking. In total, four marijuana cigarettes were smoked. On one occasion, Deputy Massong asked the Petitioner to roll another marijuana cigarette which was done and thereafter smoked by all persons in the room.

After some time, the other residents of the house went to bed, and the Petitioner and the two detectives were left alone in the living room of the house. Officer O'Dell then determined to arrest the Petitioner. O'Dell pulled his firearm, placed it at the right temple of the Petitioner, handcuffed him, and placed him under arrest. At that time, he told the Petitioner that he would "blow him away" if he ran. Shortly after the arrest, a consent to search form was executed by the Petitioner.

When the Petitioner signed the consent form, he was handcuffed, and Officer O'Dell had his firearm pointed at the Petitioner's head. The Petitioner, who was under the influ-

ence of drugs and alcohol could not comprehend the information on the card and told Officer Massong that he could not read it. The Petitioner believed that if he did not sign the consent form, the officers would have to wake up a judge to sign a search warrant which could affect the outcome of his case. It was his belief that the officers were high on marijuana and alcohol and he was afraid for his physical well-being. The Petitioner testified that he executed the consent to search form based on his fear of the alcohol and drug effect on the officers as well as his fear for his own physical safety.

A Motion to Supress the Evidence discovered in the search was denied in Spokane County Superior Court after a finding that the Petitioner, Michael Ray Richter's, consent was voluntarily given. Following the submission of briefs and oral argument, the final judgment of the Court of Appeals, Division III, State of Washington, was entered on July 28, 1976, affirming the Superior Court's judgment on the Motion to Supress. A timely Petition for Rehearing was filed and denied on September 23, 1976. The Petition for Review was considered by the Supreme Court of the State of Washington without oral argument and denied on February 7, 1977.

REASONS FOR GRANTING THE WRIT

THE COURT BELOW DECIDED A FEDERAL QUESTION OF SUBSTANCE NOT IN ACCORD WITH THE APPLICABLE DECISIONS OF THIS COURT.

A review of the undisputed facts in this case indicates that the consent to search could not be voluntarily and freely given under the "totality of all the circumstances" test announced

by this Court in *Schneckloth v. Bustamonte,* 412 U.S. 218 (1973). The Fourth and Fourteenth Amendments (Appendix D, p. xv) require that the consent not be coerced, by explicit or implicit means, by implied threat or covert force. In this case, there was substantial evidence of inherently coercive tactics used by the police detectives at the time of the Petitioner's consent which under the *Schneckloth* test must result in a finding that this consent was not voluntary. At the time of the alleged consent, the Petitioner had been placed under arrest and handcuffed. The detectives had drawn their guns and Detective O'Dell held his gun at the right temple of the Petitioner shortly before the consent. The police officers deliberately appeared to have been smoking marijuana and drinking alcohol prior to their arrest of the Petitioner and had intentionally given the Petitioner such an impression in order to gain acceptance in the house. Therefore, the Petitioner had reason to be intimidated when the plainclothes officers pulled their revolvers, arrested him, and obtained his "consent" to search.

As a result of the alcohol furnished by the police officers and the marijuana smoked in the officer's presence, the capacity of the Petitioner to freely and voluntarily give his consent was reduced. Further, Detective Massong had induced the Petitioner to smoke more marijuana by asking him to roll another cigarette, thereby contributing to the Petitioner's incapacity to freely consent. Finally, the police officers' use of coercive tactics, by threatening to "blow him away" while the drawn guns were held to his head, vitiates any doubt that the Petitioner's consent could be considered voluntary under the test announced in this Court's decision in *Schneckloth.* This consent was not the product of an essentially free and unconstrained choice by the Petitioner. There is no doubt, that his will was overborn and his capacity for self-determination critically impaired.

The *Schneckloth* decision was a narrow holding. As the Court stated:

> "We hold only that when the subject of a search is not in custody and the State attempts to justify a search on the basis of his consent, the Fourth and Fourteenth Amendments require that it demonstrate that the consent was, in fact, voluntarily given, and not the result of duress or coercion, express or implied. Voluntariness is a question of fact to be determined from all the circumstances, and while the subject's knowledge of a right to refuse is a factor to be taken in account, the prosecution is not required to demonstrate such knowledge as a prerequisite to establishing a voluntary consent." 412 U.S. at 248-249.

Unlike the facts in *Schneckloth,* this Petitioner was in custody and had been arrested prior to the alleged consent. The burden of proof of a voluntary consent is particularly heavy in cases where the individual is under arrest. *Judd v. United States,* 190 F.2d 649 (D.C. Cir. 1971). There, the Court stated:

> "This burden (of proving consent) on the Government is particularly heavy in cases where the individual was under arrest. Nonresistance to the orders or suggestions of the police is not infrequent in such a situation; true consent, free of fear or pressure, is not so readily to be found. (Citation omitted) In fact, the circumstances of the defendant's plight may be such as to make any claim of actual consent 'not in accordance with human experience,' and explainable only on the basis of 'physical or moral compulsion.' " (Citation omitted) 190 F.2d at 651.

See *State v. Mapp*, 476 F.2d 67 (6th Cir. 1973), *United States v. Bolin*, 514 F.2d 554 (7th Cir. 1975), *United States v. Rothman*, 492 F.2d 1260 (9th Cir. 1973), and *United States v. Heimforth*, 493 F.2d 970 (9th Cir. 1974), where the courts held that an arrest is a critical factor in determining whether or not consent is voluntary.

If the restrictions placed upon the obtaining of consent to search are to have any meaning, the circumstances of alcohol, firearms, marijuana, arrest and threats, all attributable to the arresting officers, must give this Court pause in condoning and accepting the voluntariness of the consent obtained thereby. Keeping in mind the admonition of the Court in *Judd v. United States, supra,* that the burden of proof of a voluntary consent is particularly heavy where the individual is under arrest, it is inconceivable that such circumstances as are apparent from this case would be anything but coercive.

The burden of proof is on the state to prove that a consent to search was freely and voluntarily given without force, coercion, or inducement. It is submitted that the level of intimidation and force exercised by the police officers in this case should render it impossible to meet the burden of proof imposed upon the state to show the voluntariness of the consent. Human experience tells us that a person cannot help but be intimidated and overwhelmed by the combination of drawn firearms, handcuffs, threats, and intoxicating substances. When the state has created such an atmosphere, it cannot then rely on a "consent" flowing therefrom to circumvent the Fourth Amendment. If this decision of the trial court is allowed to stand, police officers will have a license to use whatever coercive methods and tactics necessary to overcome the

will of a citizen so long as a consent to search form is ultimately signed.

CONCLUSION

For the foregoing reasons, the decision of the Washington Court of Appeals, Division III, in the instant case raises a serious constitutional question which should be reviewed by this Court in light of the test for voluntariness established in *Schneckloth v. Bustamonte,* 412 U.S. 218 (1973). It is respectfully submitted that this Petition for Certioari should be granted.

DATED, March 16, 1977.

Respectfully submitted,

ROBERT H. WHALEY,
PATRICK H. WINSTON
WINSTON, CASHATT,
REPSOLD, McNICHOLS,
CONNELLY & DRISCOLL
Attorneys for Petitioner

(Appendices Follow)

APPENDICES

INDEX TO APPENDICES

Pages

Appendix A

1. Opinion of Court of Appeals, Division III, State of Washington ..... i-vi

Appendix B

1. Order Denying Petition for Review, Supreme Court State of Washington vii

Appendix C

1. Appellant's Petition for Modification of Opinion or in the Alternative for a Rehearing ..... viii-x
2. Order Denying Petition for Rehearing xi

Appendix D

1. State Statutes
   (a) RCW 69.50.401(c) xii
2. Constitutional Provisions
   (a) Amendment IV xiii
   (b) Amendment XIV xiii

Appendix A

OPINION OF COURT OF APPEALS, DIVISION III, STATE OF WASHINGTON

STATE OF WASHINGTON Respondent, vs. MICHAEL RAY RICHTER, Appellant.	)	No. 1638-III Division Three Filed July 28, 1976

McINTURFF, C. J.—Michael Ray Richter appeals from a conviction of felony possession of a controlled substance, marijuana. We affirm.

When two deputies concluded their informant's tip was insufficient to form probably cause for a search of Mr. Richter's home, the deputies purchased two six-packs of beer, a fifth of wine, and hors d'oeuvres, and accompanied their informant to the home to further investigate. Mr. Richter knew the informant, so he invited them into the house. The beer and wine were placed on a table in the room. Mr. Richter immediately began to smoke marijuana, offered three or four joints to the deputies, and exhibited a can of marijuana seeds. The arrest was made 50 minutes later, when the deputies were alone in the room with Mr. Richter. Mr. Richter was given *Miranda* warnings and allegedly consented to a search of the premises.

A motion to suppress evidence discovered in the search was denied after a finding that Mr. Richter's consent was volun-

tary. We are asked to review the Court's finding of a voluntary consent.

The voluntariness of a consent is a question of fact to be determined from the totality of circumstances of each case.[1] Because validity of the search presents a constitutional issue, we will make an independent review of the entire record in deciding the voluntariness of the consent.[2] However, when evidence is conflicting, as in the present case, the trial court's finding of voluntary consent will be accorded great weight by this Court.[3] The burden remains on the State to affirmatively prove consent.[4]

Upon careful review of the record, we find evidence *which if believed* shows Mr. Richter's consent to be involuntary. At the time of the consent, Mr. Richter was a minor, under arrest, and handcuffed. A demand for consent was made by deputies when Mr. Richter's mind was confused from the effects of liquor, dope, and the shock of arrest. He was told of, but was not allowed to read, his right to refuse the search. He had been told to run so deputies could "put a bullet through him" or "blow him away," and had a gun held to his right temple while the premises were being secured. A gun was still drawn when the consent form was signed, there being other occupants of the house to guard. Mr. Richter feared for his own safety, believing the armed deputies to be intoxicated

[1] *Schneckloth v. Bustamonte*, 412 U.S. 218, 224, 36 L. Ed. 2nd 854, 93 S. Ct. 2041 (1973); *State v. Shoemaker*, 85 Wn.2d 207, 212, 533 P.2d 123 (1975).

[2] *State v. Garske*, 74 Wn.2d 901, 902-03, 447 P.2d 167 (1968); *State v. Smith*, 72 Wn.2d 479, 481, 434 P.2d 5 (1967).

[3] *State v. Smith*, 72 Wn. 2d 479, 481, 343 P.2d 5 (1967).

[4] *Bumper v. North Carolina*, 391 U.S. 543, 548, 20 L. Ed. 2d 797, 88 S. Ct. 1788 (1968); *State v. Shoemaker*, 85 Wn.2d 207, 210, 533 P.2d 123 (1975).

with liquor and dope. Finally, he was told by deputies that it would be necessary to wake, and thus anger, a magistrate to secure a search warrant if consent was not given.

Contrary testimony shows Mr. Richter's consent to be voluntary. He was a high school graduate. He was given *Miranda* warnings orally and in writing, was advised orally and in writing of his right to refuse the search, and then signed the consent form.[5] Mr. Richter stated at the time of signing that he was acquiescing in the search because he believed deputies had sufficient cause to get a search warrant if consent was refused.[6] He was coherent, competent, and not intoxicated when he consented—as demonstrated by his concern with deputies awakening and angering a magistrate to get a search warrant, which he feared would prejudice the future of his case. Finally, and most importantly, the Court listened to the testimony of Mr. Richter, observed his demeanor, and disbelieved his testimony of coercion.

The trial court weighed conflicting evidence and found the consent voluntary, which finding is entitled to great weight on review. After reviewing the record we conclude there is sufficient evidence to support the finding of voluntary consent. The totality of circumstances shows that Mr. Richter made a free and unconstrained choice to allow a search of his home. The search was inoffensive to principles of due process, with fruits of the search being properly admissible.[7]

[5] *See State v. Shoemaker*, 85 Wn.2d 207, 212, 533 P.2d 123 (1975); *State v. Smith*, 72 Wn. 2d 479, 481, 434 P.2d 5 (1967).

[6] *See State v. Lyons*, 76 Wn.2d 343, 346-47, 458 P.2d 30 (1969).

[7] *Schneckloth v. Bustamonte*, 412 U.S. 218, 225, 36 L. Ed. 2d 854, 93 S. Ct. 2041 (1973); *Culombe v. Connecticut*, 367 U.S. 568, 602, 6 L. Ed. 1037, 81 S. Ct. 1860 (1961).

Mr. Richter further contends that supply of liquor to minors was misconduct by deputies warranting suppression of fruits of the search. We disagree.

Involved are the conflicting interests of effective crime detection and punishment, and fair treatment of the accused. "Limited participation"[8] by police in unlawful practices is to be tolerated and recognized as lawful because "criminal activity is such that stealth and strategy are necessary weapons in the arsenal of the police officer."[9] Infiltration of drug enterprises through deceit and unlawful participation is a permissible and often necessary means of investigation and enforcement.[10]

However, there is a point at which police become so enmeshed in criminal activity through overzealous law enforcement as to make prosecution of the defendant repugnant to principles of American criminal justice.[11] To affect a criminal conviction, police misconduct must run contrary to "fundamental fairness" and be "shocking to the universal sense of justice."[12]

Reviewing briefly the facts, Mr. Richter was a 19 year old minor at the time of his arrest. Deputies brought two six-packs of beer and a fifth of wine to Mr. Richter's home, and

[8] *State v. Emerson,* 10 Wn. App. 235, 240, 517 P.2d 245 (1973).

[9] *Sherman v. United States,* 356 U.S. 369, 2 L. Ed. 2d 848, 78 S. Ct. 819 (1958).

[10] *United States v. Russell,* 411 U.S. 423, 432, 36 L. Ed. 2d 366, 93 S. Ct. 1637 (1973); *State v. Emerson,* 10 Wn. App. 235, 238, 517 P.2d 245 (1973).

[11] *United States v. Russell,* 411 U.S. 423, 431-32, 36 L. Ed. 2d 366, 93 S. Ct. 1637 (1973); *Rochin v. California,* 342 U.S. 165, 173, 96 L. Ed. 183, 72 S. Ct. 205 (1952).

[12] *United States v. Russell,* 411 U.S. 423, 431-32, 36 L. Ed. 2d 366, 93 S. Ct. 1637 (1973).

offered the liquor to those present by placing the liquor on a table accessible to all. The beer was used as a prop to gain the confidence and acceptance of Mr. Richter, and to investigate his supposed drug enterprise.

In the Prohibition era case of *State v. Budreau,* 156 Wash. 103, 286 P. 51 (1930), minors were allegedly used as agents in the purchase of illegal alcohol. The court bristled at the suggestion, and found the taking of "young girls to questionable resorts and plying them with liquor" to be "contemptible and reprehensible."[13] It was concluded that if agents were guilty of this misconduct, "they merited condign punishment."[14] However, the conduct in *State v. Budreau, supra,* is not comparable today to the instant case. The officers used the beer and wine primarily to gain entrance and then confidence of the defendant and his friends. There was no proven effort by the officers to ply Mr. Richter with intoxicants so they could lessen his will and take advantage of an affected condition. The court found otherwise when it declared that the consent to search was voluntary, and that Mr. Richter was not under the influence of liquor or drugs to the extent he could not make a valid waiver of consent.

Offering beer to a 19 year old man is illegal in Washington and is police misconduct, but today is not "contemptible and reprehensible" or "shocking to the universal sense of justice" in a degree warranting reversal of this felony conviction.

Judgment of the Superior Court is affirmed.

[13] *State v. Budreau, supra.*

[14] *State v. Budreau, supra.*

Pursuant to RCW 2.06.040 as amended by Laws of 1971, ch. 41, § 1, p. 63, this opinion will not be published.

/s/ McInturff, C. J.

WE CONCUR:

/s/ Munson, J.

/s/ Green, J.

Appendix B

ORDER DENYING PETITION FOR REVIEW

THE SUPREME COURT OF WASHINGTON

STATE OF WASHINGTON	)	
	)	No. 44483
Respondent,	)	(1638-III)
	)	
vs.	)	ORDER
	)	DENYING
MICHAEL RAY RICHTER,	)	PETITION
	)	FOR REVIEW
Petitioner.	)	

The Court having considered the petition for review of the decision of the Court of Appeals in this cause,

It is ordered that the petition be and it is hereby denied.

Dated this 7th day of February, 1977.

By the Court:

/s/ _____

Wright, C. J.

15 Wn. App. 1038

Appendix C

APPELLANT'S PETITION FOR MODIFICATION OF OPINION OR IN THE ALTERNATIVE FOR A REHEARING

In the Court of Appeals of the State of Washington
Division No. III

STATE OF WASHINGTON,	)	
	)	No. 1638-III
Respondent,	)	
	)	
vs.	)	
	)	Filed August 26, 1976
MICHAEL RAY RICHTER,	)	
	)	
Appellant.	)	

TO THE HONORABLE CHIEF JUDGE AND ASSOCIATE JUDGE OF THE COURT OF APPEALS OF THE STATE OF WASHINGTON, DIVISION III:

On July 28, 1976, this Court rendered its decision affirming the trial court's ruling denying a Motion to Suppress Evidence and upholding the finding of voluntary consent.

The Appellant in the above-entitled matter and as Petitioner herein, moves that the Court modify its opinion by reversing the judgment of the trial court in all respects, or in the alternative grant to Appellant-Petitioner a rehearing for the reason and on the ground, to wit:

1. This Court should reconsider its opinion that there is sufficient evidence to support the finding of voluntary consent in the light of certain uncontested facts in the record which show Mr. Richter's consent to be involuntary.

This Petition for Rehearing is based on the records and files in this matter, and the legal argument presented hereafter in support of this Petition.

ARGUMENT

Appellant-Petitioner respectfully submits that there are certain undisputed facts which the Court erroneously indicated were in contest. Under *Schneckloth v. Bustemonte,* 412 U.S. 218, 224 (1973), the "totality of all the circumstances" test requires the Court to balance all the factors in determining the voluntariness of a consent. There are certain undisputed facts which, when taken together, indicated a lack of voluntary consent and a "vulnerable subjective state" of mind. These are:

1. It is undisputed that Mr. Richter was a minor, who was under arrest and handcuffed at the time of the consent. (St. 15, 16)

2. It is undisputed that Mr. Richter had been told to run by the deputies so they could "put a bullet through him" or "blow him away" and that they held a gun to his right temple at the time of his consent. (St. 47, 15, 16)

In its opinion, this Court stated that if the above evidence is believed, it would show Mr. Richter's consent was involuntary. The burden of proof is on the State to prove that a search was made voluntarily and without force or inducement. *State v. Garske,* 74 Wn.2d 901 (1968). Further, under *State v. Greco,* 52 Wn.2d 265 (1958), that burden of proof must be met by clear and positive evidence that there was no actual or implied coercion or that the consent was given

either under a physical or moral compulsion. Appellant-Petitioner submits that the above uncontested facts are sufficient to imply coercion or physical compulsion to submit to the invalid search. Certainly, the evidence of the State does not establish by "clear and positive evidence" that the consent was uncoerced.

CONCLUSION

Appellant-Petitioner respectfully concludes that the uncontested facts in the record establish conclusively that the State has failed to meet its burden of establishing that a consent to search given by a minor under arrest was free of actual or implied coercion or physical or moral compulsion. Therefore, Appellant-Petitioner respectfully requests this Court to modify its opinion by reversing the judgment of the trial court in all respects, or in the alternative grant to Appellant-Petitioner a rehearing.

Respectively submitted,

/s/ _____

ROBERT H. WHALEY
WINSTON, CASHATT, REPSOLD,
McNICHOLS, CONNELLY & DRISCOLL
Attorneys for Appellant

IN THE COURT OF APPEALS
OF THE STATE OF WASHINGTON

STATE OF WASHINGTON	)	
	)	No. 1638-III
Respondent,	)	
	)	
	)	
	)	Division Three
vs.	)	
	)	ORDER
MICHAEL RAY RICHTER,	)	DENYING
	)	PETITION
Appellant.	)	FOR
	)	REHEARING
PETITION	)	

The Court has considered the Petition for Rehearing. That Petition is denied.

DATED: September 23, 1976.

/s/ J. Ben McInturff
Chief Judge

Filed: September 23, 1976

15 Wn. App. 1038

Appendix D

RCW 69.50.401 states in part:

. . .

"(c) It is unlawful for any person to possess a controlled substance unless the substance was obtained directly from, or pursuant to, a valid prescription or order of a practitioner while acting in the course of his professional practice, or except as otherwise authorized by this chapter. Any person who violates this subsection is guilty of a crime, and upon conviction may be imprisoned for not more than five years, fined not more than ten thousand dollars, or both, except as provided for in subsection (d) of this section."

Amendment IV of the Constitution of the United States reads as follows:

AMENDMENT [IV.]

"The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized."

Amendment XIV, Section 1, of the Constitution of the United States reads as follows:

AMENDMENT XIV.

"Section. 1. All persons born or naturalized in the United States and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; or shall any State deprive any persons of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws."